United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'
Date: July 22, 1997

Case No. 95 INA 492

In the Matter of:

COMPUTERS & SOFTWARE SALES, INC.,
Employer

on behalf of

AKBAR PETIWALA,
Alien

Appearance: E. S. David, Esq., of New York, New York.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Akbar Petiwala (Alien) by Computers & Software Sales, Inc., (Employer), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On September 29, 1993, the Employer, a consulting, hardware & software company, filed an application for alien employment certification on behalf of the Alien to fill the position of Systems Analyst. The job to be performed was described as follows:

> Consult with end-user and top management clients to provide Systems Analysis services relating to design & development of hardware/software projects on windows, windows NT, unix & Lan environments. Manage presales engineering for technical proposals using Emis & Mis system. Design Lan, Wan system using Novell, Banyan, MS Lan Manager, OD/2 & Unix using different network topologies. Design & develop cabling technologies using UTP, STP, ENET, token Ring & Fiber devices. Provide corporation data traffic routing schemes using routers. Design & set up enterprise wide network e-mail systems. Design & develop DOS, Windows, NT, OS/2 & Unix based applications for heterogenous environments. Design & set up client server applications using databases like Sybase, Informix & oracle and GUI envir. Administer large networks for fortune 500 companies using SNMP system, Spectrum, sniffer. Provide CBT, video aided training for System installation, networking & mgmt. procedures.

Minimum requirements for the position were listed as a Masters degree in Computer Science and one year experience in the job offered. AF 24-25.

Employer received three applicant referrals in response to its recruitment efforts. Two of the U. S. workers were rejected as not qualified for the position. The third applicant was rejected on grounds that he was not interested in the position. AF 28, 30, 34.

Notice of Findings. On February 13, 1995, the CO issued a Notice of Findings (NOF) advising the Employer that certification would be denied, subject to rebuttal by the Employer. The reasons for denial

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

of certification were based on the CO's finding that the Employer's requirements for the position were excessive and restrictive. The Employer was instructed either to amend the requirements or to prove their business necessity pursuant to 20 CFR § 656.21(b)(2). Employer was instructed that its business necessity documentation should include proof under the following categories: "(1) Define each data processing skill and document the function of each. (2) Identify projects in which each of the skills was used and the man hours spent on each per month. (3) Document that it is normal for employer to require this specific combination of skills; submit excerpt from personnel manual, copies of contracts or other documents. (4) List by name the number of present employees who had all of the items above prior to hire; document the number hired through the U.S. job market." Citing 20 CFR § 656.21(b)(5), the CO noted a further reason for denial of certification by observing that it was doubtful that the Employer's stated requirements were its actual minimum necessary for performance of the job, noting that the alien did not appear to meet this minimum at the time he was hired by the Employer. AF 49-52.

Rebuttal. By way of its rebuttal and response to the CO's directions in the NOF, the Employer identified the listed skills and explained their general applications, stressing that knowledge and experience in all of these are a necessary and integral part of system analysis; and it listed the projects completed by the alien and the on going projects. In addition, the Employer's rebuttal explained that, "Since the today's customer computing demands are challenging and complex, system analysis job requires theoretical knowledge and experience in hardware and software. The system analyst must be able to perform these multiple tasks in order to serve customer needs properly. In computer industry it is typical for the worker to perform these multiple duties which are closely related to proper performance of the job". The Employer admitted, moreover, that nobody had the same skills at the time that it first hired the Alien, adding that currently the Alien is the key employee. At the same time, the Employer offered proof that it did not train the Alien and that the Alien met these minimum requirements at the time he was hired. AF 54-58.

Final Determination. Labor certification was denied in a Final Determination, which was issued by the CO on March 23, 1995. While the CO determined in denying certification that Employer had rebutted the CO's finding under 20 CFR § 656.21(b)(5), the CO found that the Employer had failed to adequately rebut the finding that the Employer had based the requirements of the position on the Alien's skills. For this reason the skills required by the Employer were found to be restrictive under 20 CFR § 656.21(b)(2). The CO explained that certification was denied because (1) Employer failed to document that the requirements are normal for the Employer; (2) Employer failed to document business necessity for the twenty-five requirements with excerpt from personnel manual, with copies of contracts, or with other documents. "It seems to us," said the CO, "that the alien

determines the systems, methods, software and utilities used, and the choice is based on the alien's skills." AF 68-70.

Appeal. On April 24, 1995, the Employer filed a Request for Review. Thereafter Employer also filed a Brief on Appeal in support thereof. The Employer argued on appeal that its System Analyst job requirements are normal for Employer and to the industry, that Employer has documented a business necessity for the twenty-five job requirements and that the job requirements are not based on the Alien's skills. As further evidence, the Employer submitted signed contracts that had been executed between the Employer and its client companies with a summary of the knowledge and experience in software /hardware required in each of those contracts.

Discussion

The Employer is required by 20 CFR § 656.21(b)(2) to document that the requirements for the position, unless proven to have arisen from business necessity, are normally required for the performance of the job in the United States and as defined for the job in the DOT.

In this case the CO objected to Employer's requirement of experience in twenty-five specified data processing skills. The CO found such job requirements to be excessive and restrictive and instructed Employer to either amend its requirements or document their business necessity. In documenting the business necessity of job requirements the Employer was instructed to address the issues the CO stated by providing documentary and other proof that it is normal for Employer to require this specific combination of skills by submitting an "excerpt from [Employer's] personnel manual, copies of contracts or other documents". The Employer chose not to submit such evidence in response to the explicit instructions of the CO, however, but instead simply offered a general statement declaring its job requirements to be typical in the computer industry.

Where an alien labor certification regulation does not require information to be in a specific form, and the CO has not made a request for a reasonably obtainable and relevant document, written assertions that are reasonably specific and indicate their sources or bases are to be considered documentation. However, if the CO requests a document which (1) has a direct bearing on the resolution of an issue and (2) can be obtained by reasonable efforts, the employer must produce it. **Gencorp**, 87 INA 659 (Jan. 13, 1988)(en banc). It follows that an employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. **STLO Corporation,** 90 INA 007(Sept. 9, 1991). This record is similar to **Personnel Sciences, Inc.,** 90-INA-043 (Dec. 12, 1990), where employer required applicants to have knowledge of specific computer hardware and software, the CO requested copies of consultancy contracts showing that the employers' clients

needed such expertise, and the employer failed to provide the requested information).[3]

In this case the CO directed the Employer to file specific documentation that had a direct bearing on the resolution of the issue at hand, which was reasonably obtainable by Employer. This Employer neither provided the information requested nor justified its failure to do so, however. As the CO denied certification for the reasons stated in the holdings cited above, we find that the Employer's challenge to the CO's denial of certification on appeal lacks merit and should be rejected.

We further note, moreover, that the Employer finally offered to submit such documentation in support of its appeal. In a few words, the Employer's action does not cure the defect, and its untimely offer of compliance cannot be accepted nor its proposed exhibits considered. The reason is that 20 CFR § 656.26(b)(4) provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based". Evidence first submitted with the request for review will not be considered by the Board, as an employer cannot supplement the record on appeal. **Staffcon, Inc.,** 92 INA 323 (July 19, 1993)[4]

Accordingly, we conclude that labor certification was properly denied by the CO and enter the order that follows.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

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[3]Also, where the employer does not justify its failure see **Bakst International,** 89 INA 265 (Mar. 14, 1991); **Vernon Taylor**, 89 INA 258 (Mar. 12, 1991); and **Oconee Center - Mental Retardation Services,** 88 INA 040 (July 5, 1988).

[4]Also see **ST Systems, Inc.**, 92 INA 279 (Sept. 2, 1993); **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992); **Kelper International Corp.**, 90 INA 191 (May 20, 1991); **Kogan & Moore Architects, Inc.**, 90 INA 466 (May 10, 1991); **White Harvest Mission**, 90 INA 195 (Apr. 19, 1991); **The Fifteenth Street Garage**, 90 INA 052 (Nov. 21, 1990); **University of Texas at San Antonio,** 88 INA 071 (May 9, 1988).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 492

COMPUTERS & SOFTWARE SALES, Inc., Employer
AKBAR PETIWALA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: July 9, 1997